



**TAS / CAS**

TRIBUNAL ARBITRAL DU SPORT  
COURT OF ARBITRATION FOR SPORT  
TRIBUNAL ARBITRAL DEL DEPORTE

**CAS 2022/A/8766 Varvara Lepchenko v International Tennis Federation**

## **CONSENT ARBITRAL AWARD**

**delivered by the**

## **COURT OF ARBITRATION FOR SPORT**

**sitting in the following composition:**

President: Mr James Drake, K.C., Barrister, London, United Kingdom  
Arbitrator: Mr Christopher Campbell, Attorney, San Francisco, United States of America  
Arbitrator: Mr Ulrich Haas, Attorney in Hamburg and Professor in Zurich, Switzerland

**in the arbitration between**

**Ms Varvara Lepchenko**, Pennsylvania, United States of America

Represented by Mr Howard L. Jacobs and Ms Lindsay S. Brandon, Attorneys, Law Offices of Howard L. Jacobs, California, United States of America

**- Appellant -**

**and**

**The International Tennis Federation**, London, United Kingdom

Represented by Mr Chris Lavey, Solicitor, Bird & Bird, London, United Kingdom

**- Respondent -**

## **I. PARTIES**

1. The Appellant is Ms Varvara Lepchenko (the “Player” or the “Appellant”), a top-level professional tennis player originally from Tashkent, Uzbekistan, but is now an American citizen residing in Pennsylvania, USA. She has been a professional tennis player since 2001, and has won numerous titles in both singles and doubles. The Player is currently ranked 119 in singles by the World Tennis Association (“WTA”) and has a career-high WTA ranking of 19.
2. The Respondent is the International Tennis Federation (the “ITF” or the “Respondent”) is the international sports federation for the sport of tennis and has its headquarters in London, United Kingdom. Amongst other things, it is the role of the ITF to promote the integrity of tennis and to protect the health and rights of tennis players. To these ends, the ITF, a signatory to the World Anti-Doping Code (the “WADC”) established by the World Anti-Doping Agency (“WADA”), adopted the 2021 Tennis Anti-Doping Programme (the “TADP”) to implement the provisions of the WADC for the sport of tennis.

## **II. FACTUAL BACKGROUND OF THE DISPUTE**

3. The Player participated in the Hungarian Grand Prix held at the Romai Tennis Academy in Budapest, Hungary, between 12 and 18 July 2021 (the “Event”).
4. On 21 July 2021, during the Event, a urine sample was collected from the Player on behalf of the ITF. The sample was sent to the WADA-accredited laboratory in Montreal (the “Montreal Laboratory”) for analysis. In accordance with normal practice, the sample was separated into two, an A sample and a B sample.
5. On 4 August 2021, the Montreal Laboratory reported that it had found modafinil acid, a metabolite of modafinil and/or adrafinil in the Player’s A sample. Modafinil and adrafinil are non-specified prohibited substances prohibited in-competition under Class S6 on the 2021 WADA Prohibited List.
6. On 11 August 2021, the ITF notified the Player of the adverse analytical finding (“AAF”) and potential anti-doping rule violation (“ADRV”) in breach of Articles 2.1 and/or 2.2 of the TADP and imposed a provisional suspension on the Player in accordance with TADP Article 7.12.1, with effect from 19 August 2021.
7. On 16 August 2021, the Player responded to the ITF’s notice, denying that she had committed an ADRV, requesting that the Player’s B sample be analysed, and requesting a hearing before the ITF’s independent tribunal.
8. On 20 August 2021, the Montreal Laboratory reported that it had found modafinil acid in the Player’s B sample, thereby confirming the finding in the A sample.
9. On 25 August 2021, the ITF sent a ‘Charge Letter’ to the Player, formally notifying her that she was being charged with an ADRV under TADP Articles 2.1 and/or 2.2, and requesting a response from the Player to the charge within 20 days.

10. On 14 September 2021, the Player responded to the Charge Letter, denying the charge and requesting a hearing before the ITF Independent Tribunal.

### **III. SUMMARY OF THE PROCEEDINGS BEFORE THE ITF INDEPENDENT TRIBUNAL**

11. On 22 September 2021, the Chairman of the ITF Independent Panel, Mr Charles Flint QC, appointed Mr David Casement QC as Chair of the Independent Tribunal; and on 9 November 2021, Dr Gary O'Driscoll and Ms Erika Riedl were appointed to form the Independent Tribunal to hear and determine this dispute.
12. On 10 January 2022, the Player filed a pre-hearing brief, accepting the charge and accepting that she could not identify the source of the modafinil acid that was found in her sample collected on 12 July 2021, but asserting that she was able to rebut the presumption of intentional use of modafinil and/or adrafinil, and submitted that therefore the otherwise applicable four-year period of ineligibility should be reduced to two years.
13. On 4 February 2022, the ITF filed its reply brief, by which it asserted that the Player had not discharged her burden to prove that her violation was not committed intentionally. In expert evidence accompanying the reply brief, the ITF disclosed to the Player and the Independent Tribunal that bemetil, a substance that was on WADA's 2021 Monitoring Program but was not and is not prohibited, was also found in the Player's sample.
14. On 17 February 2022, the hearing before the Independent Tribunal took place by way of video conference. During her oral evidence, the Player explained the circumstances of her purchase and ingestion of bemetil, and stated that she believed she no longer had the bemetil in her possession.
15. On 3 March 2022, the Independent Tribunal issued its decision (the "Appealed Decision"), finding that the Player had not rebutted the presumption that her ADRV was committed intentionally, and imposed a four-year period of ineligibility on her, backdated to 19 August 2021 to credit her for the period of provisional suspension served. The Independent Tribunal ordered as follows: (1) that the Player had committed ADRVs pursuant to Articles 2.1 and 2.2 of TADP based on the presence of a metabolite of modafinil and/or adrafinil in her urine sample; (2) that the Player was subject to a period of ineligibility of four (4) years commencing on 19 August 2021 in accordance with TADP Article 10.13.2; and (3) the Player's results at the Event were disqualified in accordance with TADP Articles 9.1 and 10.1, as were all of her results (with all resulting consequences) obtained in the period between 13 July 2021 and 27 July 2021.

### **IV. SUMMARY OF THE PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT**

16. On 23 March 2022, the Player filed her Statement of Appeal against the Appealed Decision with the Court of Arbitration for Sport ("CAS") in accordance with Article R48 of the Code of Sports-related Arbitration (2021 edition) (the "Code"). In her Statement of Appeal, the Player appointed as arbitrator Mr Christopher Campbell, Attorney in San Francisco, United States of America.

17. On 4 April 2022, the Player filed her Appeal Brief together with her supporting evidence, further to Article R51 of the Code. In the Appeal Brief, the Player stated that, after the hearing before the Independent Tribunal, she returned home and found, in the lining of a travel bag that had been stored away, the bottle of bemetil that she had purchased in Ukraine in October 2020 and from which she had consumed capsules in the days prior to the sample collection in Hungary.
18. The Player sent the bemetil (which listed no prohibited substance on the bottle label) to a laboratory for testing, and the laboratory confirmed that the bemetil capsules contained traces of modafinil. At the ITF's request, the Player also sent the bemetil bottle to a WADA-accredited laboratory for testing, and also that laboratory confirmed that the bemetil capsules contained traces of modafinil.
19. The ITF subsequently contacted the manufacturer of the bemetil (based in Kyiv, Ukraine) and purchased a bottle of bemetil that had been manufactured at the same time as the Player's bemetil. The ITF sent this bottle of bemetil for testing at a WADA-accredited laboratory, which laboratory confirmed that the bemetil contained traces of modafinil.
20. On 11 April 2022, the ITF nominated as arbitrator Dr Ulrich Haas, Attorney in Hamburg, Germany and Professor in Zurich, Switzerland.
21. On 13 April 2022, Dr Haas made a disclosure to the Parties further to Article R33 of the Code, as to which there was no challenge made by the Parties under Article R34 of the Code.
22. On 19 April 2022, a procedural calendar was agreed to between the Parties. This calendar was subsequently modified several times to allow, amongst other things, for continued testing of the bemetil and other possible contaminated products.
23. On 25 July 2022, the ITF informed the CAS Court Office that the testing had been completed, and accordingly, per the Parties' agreed procedural calendar, the deadline for the Answer to be filed was set for 1 August 2022.
24. On 1 August 2022, the ITF filed its Answer further to Article R55 of the Code, in which (amongst other things) it accepted that the source of the modafinil acid found in the Player's sample was her ingestion of capsules of bemetil that she purchased in Ukraine and were, unknown to her, contaminated with modafinil.
25. On 8 August 2022, the CAS Court Office informed the Parties that the Deputy President of the CAS Appeals Arbitration Division, pursuant to Article R54 of the Code, had decided that the Panel appointed to decide the case was constituted as follows:  
  
President: Mr James Drake, K.C., Barrister, London, United Kingdom  
Arbitrators: Mr Christopher Campbell, Attorney, San Francisco, USA  
Dr Ulrich Haas, Attorney, Hamburg, Germany and Professor, Zurich, Switzerland
26. On 19 August 2022, after consulting the Parties, the Panel informed the Parties that it had decided to hold a hearing by video-conference further to Articles R44.2 and R57 of the Code.

27. On 29 August 2022, after consulting the Parties, the Panel informed the Parties that the hearing would be held on 16 November 2022 with 17 November 2022 held in reserve.
28. On 25 October 2022, the ITF sent to the CAS Court Office a document entitled the “Settlement Agreement to be Incorporated in a Consent Arbitral Award pursuant to CAS Code Article R56” (the “Settlement Agreement”) signed by the Parties on the same date and requested that it be embodied into a Consent Award, and confirmed that the hearing did not need to be held.
29. On 26 October 2022, the Player confirmed the content of the Settlement Agreement and the request that it be embodied in a Consent Award without a hearing.
30. On 7 November 2022, the Respondent provided the CAS Court Office with a copy of WADA’s approval of the Settlement Agreement.

**V. THE SETTLEMENT AGREEMENT**

31. The Settlement Agreement was signed by the Parties by their legal representatives on 25 October 2022.
32. The Panel has been requested to ratify the Settlement Agreement and embody its terms in a consent award.
33. The operative part of the Settlement Agreement provides as follows:

***“NOW THEREFORE, THE PARTIES HAVE AGREED (WITH THE WRITTEN APPROVAL OF WADA IN ACCORDANCE WITH ISRM ARTICLE 10.3(c), AND SUBJECT ONLY TO THE APPROVAL OF THE CAS) TO THE FOLLOWING TERMS FOR DISPOSITION OF THE APPEAL:***

- 1. Ms Lepchenko has committed a violation of TADP Article 2.1 and 2.2 in that modafinil acid was present in her urine sample collected In-Competition on 12 July 2021, for which she did not have a valid TUE.*
- 2. Ms Lepchenko has established on the balance of probabilities that the modafinil acid in her urine was the result of her ingestion of capsules of bemetil that were contaminated with modafinil. Accordingly, and in accordance with TADP Article 10.6.1.2, Ms Lepchenko will serve a 21-month period of Ineligibility, which will be deemed to have commenced on 19 August 2021 to credit her for the period served to date while Provisionally Suspended/Ineligible, in accordance with TADP Article 10.13.2. Ms Lepchenko period of Ineligibility will therefore expire at midnight on 18 May 2023.*
- 3. The results obtained by Ms Lepchenko (with all resulting consequences, including forfeiture of all medals, titles, ranking, points and prize money) at the Hungarian Grand Prix, where the sample in question was collected, will be disqualified pursuant to TADP Articles 9.1 and 10.1, and any results obtained by Ms Lepchenko obtained in the period between 13 July 2021 up to but not*

*including 27 July 2021 (when she was tested again) will also be disqualified, pursuant to TADP Article 10.10.*

4. *Each party will bear their own legal costs incurred in connection with this arbitration. In accordance with CAS Code Article R65, the costs of this appeal are free and will be borne by CAS (save for the CHF 1,000 Court Office fee, which will be retained).*
5. *The parties request that the CAS Panel issue a Consent Arbitral Award incorporating the terms of this Agreement. The parties agree that the Consent Arbitral Award may be made public by the CAS and the ITF.*
6. *The terms set out above have been agreed as full and final settlement of the parties' dispute regarding the applicable Consequences of Ms Lepchenko's violation. Accordingly, any and all other claims for relief that any party might otherwise make against any other party in relation to this dispute are released and discharged unconditionally, and they may not be pursued in any form hereafter."* (emphasis in original)

## **VI. JURISDICTION**

34. The jurisdiction of CAS, which is not disputed by the Parties, derives from Articles 13.2 *et seq.* of the TADP and Article R47 of the Code.
35. It follows that the CAS has jurisdiction to decide on the present dispute.

## **VII. RATIFICATION AND INCORPORATION OF THE SETTLEMENT AGREEMENT**

36. Article R56 para. 2 of the Code provides, in relevant part as follows: "... *Any settlement may be embodied in an arbitral award rendered by consent of the parties.*"
37. According to CAS 2019/A/6083 and CAS 2019/A/6261:

*"Under Swiss law an arbitration tribunal sitting in Switzerland has authority to issue an award embodying the terms of the parties' settlement, if the consenting parties do agree to such a termination of their dispute. The Panel's ratification of the Parties' agreement and its incorporation into this Consent Award serves the purpose of vesting the agreement with a res judicata effect and of enabling the enforcement of their said agreement.*

*It is the task of the [Panel/ Sole Arbitrator] to verify the bona fide nature of the agreement to ensure that the will of the Parties has not been manipulated to commit fraud and to confirm that the terms of the agreement are not contrary to public policy principles or to mandatory rules of the law applicable to the dispute."*

38. The Panel, having reviewed the text of the Settlement Agreement and the evidence on the CAS file in this appeal, is satisfied that the Settlement Agreement in this appeal meets those requirements: there is no reason to think that the Settlement Agreement does not constitute a *bona fide* settlement of the dispute or that the will of the Parties to this appeal

have been manipulated in any way or that the settlement offends any public policy principles or the TADP or any mandatory rules of English law as the law of the place of domicile of the ITF.

39. Further, the Settlement Agreement has, as is set forth in the agreement itself, been approved in writing by WADA pursuant to the International Standard for Results Management (“ISRM”) Article 10.3(c). That article provides as follows:

*“10.3c) No settlement embodied in an arbitral award rendered by consent of the parties as per R56 of the Code of Sports-related Arbitration shall be entered into by an Anti-Doping Organization without WADA’s written approval. Where the parties to the CAS proceedings are envisaging settling the matter by way of a settlement embodied in an arbitral award rendered by consent of the parties, the Anti-Doping Organization that is a party to the proceedings shall immediately notify WADA and provide it with all necessary information in this respect.”*

40. Upon the request of the Panel, on 7 November 2022, the Respondent provided the CAS Court Office with a copy of WADA’s approval of the Settlement Agreement, which approval was given on 25 October 2022. WADA’s approval states in relevant part as follows:

*“Further to your request under ISRM article 10.3(c) below, we inform you that WADA has decided to approve the settlement of this matter by the attached consent of the parties, which can be summarized as follows:*

- *Imposition of a 21-month period of ineligibility on Ms. Varvara Lepchencho, deemed to have commenced on 19 August 2021;*
- *Disqualification of any results obtained by the player on and from the date of sample collection – 13 July 2021 – until 26 July 2021 (included).”*

41. In all the circumstances, the Panel therefore takes the view that it is right to ratify the Settlement Agreement and its terms are incorporated into this Consent Award.
42. It follows that it is unnecessary for the Panel to consider any other requests made by the Parties. Accordingly, all other and further requests, motions, and prayers for relief are hereby dismissed.

### **VIII. COSTS**

43. This is an appeal against a decision of an international federation in a disciplinary matter and the provisions of Article R65 of the Code are applicable. In relevant part, Article R65 provides the following:

*“R65.2 Subject to Articles R65.2, para. 2 and R65.4, the proceedings shall be free. The fees and costs of the arbitrators, calculated in accordance with the CAS fee scale, together with the costs of CAS are borne by CAS.*

*Upon submission of the statement of appeal, the Appellant shall pay a non-refundable Court Office fee of Swiss francs 1,000.— without which CAS shall not proceed and the appeal shall be deemed withdrawn.*

*If an arbitration procedure is terminated before a Panel has been constituted, the Division President shall rule on costs in the termination order. She/he may only order the payment of legal costs upon request of a party and after all parties have been given the opportunity to file written submissions on costs.*

*R65.3 Each party shall pay for the costs of its own witnesses, experts and interpreters. In the arbitral award and without any specific request from the parties, the Panel has discretion to grant the prevailing party a contribution towards its legal fees and other expenses incurred in connection with the proceedings and, in particular, the costs of witnesses and interpreters. When granting such contribution, the Panel shall take into account the complexity and the outcome of the proceedings, as well as the conduct and financial resources of the parties.*

*R65.4 If the circumstances so warrant, including whether the federation which has rendered the challenged decision is not a signatory to the Agreement constituting ICAS, the President of the Appeals Arbitration Division may apply Article R64 to an appeals arbitration, either ex officio or upon request of the President of the Panel.”*

44. Having taken into consideration the above and the Settlement Agreement, more specifically paragraph 4 thereof, the Panel directs and orders as follows: (1) the costs of this appeal are free and shall be borne by the CAS, save that the CAS Court Office shall retain the CAS Court Office fee of CHF 1,000; and (2) each Party shall bear their own legal costs and expenses incurred in connection with the proceedings.

#### **IX. PUBLICITY OF THE CONSENT AWARD**

45. In accordance with the paragraph 5 of the Settlement Agreement, this Consent Award may be made public by the CAS and the Respondent.

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## ON THESE GROUNDS

**By consent, the Court of Arbitration for Sport rules that:**

1. The Settlement Agreement submitted to the CAS Court Office by the Parties on 26 October 2022 is hereby ratified by the Panel with the consent of the Parties and its terms are incorporated into this Consent Award.
2. The arbitral procedure *CAS 2022/A/8766 Varvara Lepchenko v International Tennis Federation* is terminated and deleted from the CAS roll.
3. The Parties are hereby ordered to perform their respective obligations and duties in accordance with the terms of the Settlement Agreement.
4. In accordance with the Settlement Agreement, the arbitration costs shall be borne by the CAS, save that the CAS Court Office fee of CHF 1,000 paid by Varvara Lepchenko shall be retained.
5. In accordance with the Settlement Agreement, each Party shall bear its own costs and expenses incurred in connection with the present proceedings.
6. All other motions or prayers for relief are dismissed.

Seat of arbitration: Lausanne, Switzerland  
Date: 31 January 2023

## THE COURT OF ARBITRATION FOR SPORT



James Drake  
President



Christopher Campbell  
Arbitrator



Ulrich Haas  
Arbitrator